UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/2000/NGO/91
11 February 2000

ENGLISH
Original: SPANISH

COMMISSION ON HUMAN RIGHTS
Fifty-sixth session
Item 11 (d) of the provisional agenda

CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF: (d) INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Written statement* submitted by the American Association of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1996/31.

[10 December 1999]

* This written statement is issued, unedited, as received from the submitting non-governmental organziation.

INDEPENDENCE OF THE JUDICIARY

STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Jurisdiction ratione temporis - Jurisdiction ratione materiae - Promotion of criminal action - Independence of the Court

On 17 July 1998, an international Diplomatic Conference held in Rome adopted the Statute of an International Criminal Court. One hundred and twenty government representatives voted in favour, seven representatives voted against and there were 21 abstentions (A/CONF.183/9).

The Conference also decided to establish a Preparatory Commission for the Court, which is studying the draft texts of the rules of procedure and evidence and elements of crime (A/CONF.183/9, annex 1).

The Statute remained open for signature by States and will enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance or approval with the Secretary-General of the United Nations (article 126 of the Statute). In other words, the Statute will enter into force once it has been ratified by a minimum of 60 States.

I. Jurisdiction ratione temporis

The Court will have jurisdiction with respect to crimes committed after the entry into force of the Statute (Statute, art. 11, para.1).

Nationals of States which accede to the Statute after its entry into force may be subject to the jurisdiction of the Court only with respect to crimes committed after the accession of their State (art. 11, para. 2).

The future Court will not concern itself with crimes against humanity or war crimes committed prior to the Statute's entry into force, despite the fact that both crimes were declared imprescriptible by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968, and despite the recent precedents of the Tribunals for Yugoslavia and Rwanda, which deal with serious violations of human rights committed before their establishment.

II. Jurisdiction ratione materiae

The crimes which will concern the Court are listed in article 5: (a) genocide, (b) crimes against humanity, (c) war crimes and (d) aggression. The first three are described in articles 6, 7 and 8.

The Court will not have jurisdiction with respect to, inter alia, the following crimes, which have not been included in the Statute, although some of them may be characterized as crimes against humanity:

(1) Child prostitution and child pornography.

Article 7.1 (g) of the Statute (Crimes against humanity) refers to "enforced prostitution", which does not include the offence committed by persons who prostitute minors who have given (or are assumed to have given) their consent. According to the laws of a number of countries, minors may give their sexual consent at the age of 15 or even 12. The expression "enforced prostitution" naturally excludes international traffickers in adults who have given (or are assumed to have given) their consent. Such traffickers or procurers are supposedly respectable "sex impresarios". In other words, a particularly odious and repulsive crime is excluded from the jurisdiction of the Court.

Similarly, the Court will not have jurisdiction with respect to:

(2) Unlawful international adoptions;

(3) Traffic in human organs;

(4) Ecological crimes (wilful and severe damage to the environment). This crime appeared in article 26 of the text of the Code of Crimes against the Peace and Security of Mankind, adopted by the United Nations International Law Commission at first reading, but was deleted on second reading and in the final text.

(5) Illicit traffic in narcotic drugs (which appeared in article 25 of the above text but was deleted from the final text);

(6) Colonial domination and other forms of alien domination, which appeared in article 18 of the above text but was also deleted from the final text of the draft prepared by the International Law Commission;

(7) Intervention (article 17, also deleted from the final text of the draft Code of Crimes against the Peace and Security of Mankind prepared by the International Law Commission);

(8) Recruitment, use, financing and training of mercenaries (article 23 of the text quoted, also deleted). It may be mentioned that an international convention on the subject, adopted by the General Assembly, has not entered into force for lack of sufficient ratifications;

(9) Economic crimes (serious mass violations of economic, social and cultural rights).

A number of extremely serious crimes remain outside the Court's jurisdiction. Nearly all these have in common a link to activities which bring in huge profits and the resistance of certain powerful nations to imposing effective punishment.

As regards war crimes (Statute, art. 8), a State, on acceding to the Statute, may declare that, for a period of seven years it does not accept the jurisdiction of the Court with respect to

this category of crimes if they are committed by its nationals or on its territory (art. 124). This means that the Statute envisages the possibility that States, even when they are parties to the Statute, may grant themselves a moratorium to commit war crimes for seven years after their accession to the Statute, despite the existence of the Geneva Conventions of 1949 and the 1979 Protocols Additional to the Geneva Conventions.

As regards the crime of aggression, the last part of article 5 of the Statute states that the Court shall exercise jurisdiction over the crime of aggression once, in accordance with articles 121 and 123, the crime is defined and the conditions under which the Court shall exercise jurisdiction with respect to this crime are set out. Articles 121 and 123 provide for a period of seven years after the Statute's entry into force for the introduction of substantive amendments, including the introduction of the definition of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime.

The inclusion in the Statute of the definition of aggression is thus postponed for a long time (seven years after the Statute's entry into force), and only then will the Court have jurisdiction with respect to this crime, even though the General Assembly adopted a definition of aggression by consensus in 1974 (General Assembly resolution 3314 (XXIX)).

An aggravating factor is that the crime of aggression will probably first be "filtered" by the Security Council, meaning that the jurisdiction of the Court will depend on whether the Security Council first decides that a given situation constitutes an aggression.

III. Promotion of criminal action

The Court shall exercise its jurisdiction when the Prosecutor receives a referral from a State Party (art. 13 (a) and art. 14), when the Prosecutor initiates investigations proprio motu on the basis of information he has received (art. 13 (c) and art. 15) and when (art. 13 (b)) "A situation in which one or more such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations" (as set out in article 5).

Article 13 (b) should be taken to mean that the Security Council may make referrals against nationals of any State, whether or not it is a party to the Statute and whether or not it accepts the jurisdiction of the Court.

IV. Independence of the Court

Article 16 of the Statute provides that the Court may not commence or proceed with an investigation or prosecution for a period of 12 months if the Security Council, under Chapter VII of the Charter of the United Nations, so requests. The Security Council may apparently reiterate this request to the Court indefinitely. This means that the Court will have to act with the sword of Damocles of the Security Council perpetually hanging over it, the Council being able at any time to paralyse its activity with respect to any given case, and this indefinitely.

This is a clear denial of the Court's independence, in violation of article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights, which establish the principle of the independence of the judiciary.

Professor Philippe Weckel has written that, in adopting the Statute of the International Criminal Court, the participants in the Rome Conference have dismissed the notion of an independent international judiciary, since the Court will be unable to function without the support of the Security Council.[1]

For his part, the Special Rapporteur on the independence of judges and lawyers, referring to article 16 of the Statute, has said: "Article 16 leaves the Security Council a large role by authorizing it to delay investigations or prosecutions for a year or more. The political role of the Security Council in triggering the Court's investigation and prosecution powers may, depending on how this role is played, substantially undermine the judicial independence of the Court by precluding judicial review of situations politically sensitive to one or other of the permanent members of the Council, who, of course, wield the power of veto".[2]

It may be asked whether national Parliaments should ratify a Statute vitiated by invalidity since it is contrary to some aspects of international human rights law in force (for example, with regard to the definition of aggression, the imprescriptibility of war crimes and crimes against humanity, and the sanctioning of war crimes) and, in particular, because it establishes a Court which has no independence and thus violates article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights.

A treaty is void if "it conflicts with a peremptory norm of general international law" (Vienna Convention on the Law of Treaties, article 53).

Notes

[1] Revue générale de droit international public (RGDIP), vol. 102, 1998/4, p. 986, Paris, December 1998.

[2] E/CN.4/1999/60, para. 39.